IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

CA.1196/99(F)
DC Matale
Case No.4321/L

Bowattegedara Don Francis Lional Wijerathna
C/O Prof. Nimal Seneviratne
No. 25, 04th Lane,
George E De Silva Mawatha,
Kandy.

Previously
Akuramboda Road,
Wahakotte.

PLAINTIFF

Vs

1. Kingsley Samarakoon
2. Hyacinth Wijerathna
3. Soma Wagodapola
   Akuramboda Road
   Wahakotte.

DEFENDANTS

AND BETWEEN

Bowattegedara Don Francis Lional Wijerathna
C/O Prof. Nimal Seneviratne
No. 25, 04th Lane,
George E De Silva Mawatha,
Kandy.
Previously
Akuramboda Road,
Wahakotte.

PLAINTIFF-APPELLANT

Vs

1. Kingsley Samarakoon (Deceased)

1a. Hyacinth Wijerathna

2. Hyacinth Wijerathna
3. Soma Wagodapola
   Akuramboda Road
   Wahakotte.

DEFENDANT-RESPONDENTS

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	S.A.D.S.Suraweera for the Plaintiff-Appellant.
	Rohan Sahabandu PC with Chathurika Elvitigala for the 1st and 2nd Defendant-Respondent.
Written Submissions:	Plaintiff-Appellant filed on 12.10.2018.
	Defendant Respondent filed on 03.09.2019 and 18.10.2021
Argued on:	27.01.2021 & 27.04.2021
Judgement on:	**29/10/2021**

N. Bandula Karunarathna J.

The plaintiff-appellant (hereinafter called and referred to as the "plaintiff") preferred this appeal against the judgment dated 23.04.1999 of the learned District Judge of Matale in case No. 4321/L.

The plaintiff, on behalf of the other co-owners who are members of the same family, filed this action against the defendant-respondents (hereinafter called and referred to as the "defendants") for a declaration that Lot 2 in Plan No.3071 marked as X is a portion of the land described in the schedule to the amended plaint, belonging to the plaintiff and others, for ejectment of the defendants, damages and cost of action.

The plaintiff had instituted this action, for a declaration that, the plaintiff is a co-owner of the land described in the schedule to the plaint, the same is a part of the schedule to the plaint, for the ejectment of the defendants therefrom and costs.

The plaintiff states that the defendants have encroached upon a portion of the said land which is described in the schedule on or about 03.11.1990 along the Southern Boundary and thus sought ejectment of the defendants from the said portion, land so encroached by the defendants.

The plaintiff sought a declaration of title to the land morefully described in the schedule to the said plaint, for the ejectment of the defendants and also for damages in a sum of Rs.50,000/-and for costs.

The plaintiff states that the learned trial Judge had arrived at the conclusion that the strip of land claimed by the plaintiff had been in possession of the defendants and their predecessors in title for a long period of time.

The defendants stated that they have prescribed to the said Lot 02, which according to them is a part of the land described in the schedule to the amended answer and prayed for a dismissal of this action.

The plaintiff's contention is that, Lot 2 in plan X is a part of Lot 1 and that the defendants on 03.11.1990 broke the fence and put up a fence encroaching on the southern boundary of the

plaintiff's land and installed a gate. This complaint and complaints marked as පැ 10 & පැ 11 of Maggie Wijeratne has not been challenged in evidence and this has to be accepted.

The crux of this dispute is, what is the northern and western boundary of the defendants' land, Lot 3 in plan X. The northern boundary of 1 වි 1, 1 වි 2 & 1 වි 3 is "Isabela Hamy's Garden & Jak trees" and the western boundary is the well. This is also established by the defendants in the schedule of their affidavits marked as පැ 9 (ආ) filed in Primary Court under case No.40600 marked as වි.9. In the Primary Court, it was decided to refer this dispute to the District Court. The defendants had denied that and had said that they cannot remember most of the proceedings before the Primary Court during December 1998.

As opposed to the aforesaid view of the plaintiffs, the defendants state that they have not encroached upon the plaintiff's land but are in possession of land called 'Moronthe Pillewe Watte' alias 'Moragahakumburewatte'. They further state that they themselves and their predecessors in title have been in possession of the said land inclusive of the portion of the land alleged to be encroached by them.

Therefore, the defendants state that they have been using the said portion of the land to gain access to their land from the main road and prayed for,

1. a dismissal of the plaintiff's action,
2. a claim in reconvention that they be declared entitled to the land more-fully described in the schedule to the amended answer and also
3. a declaration to the effect that the portion of the land in dispute to be a part of their land.

To this aforementioned argument, the plaintiff states that it will be observed that the western boundary of the plaintiff's land is the main road and the said boundary had been in existence at least from the year 1925 where the oldest deed of the plaintiff had been executed.

The plaintiff argued that when the encroached portion Lot 2 is annexed to Lot 1, the northern & western boundary of Lot 3 is confirmed as stated in deeds 1 වි 1, 1 වි 2, 1 වි 3 and affidavits පැ 9, පැ 9 ආ and පැ 9 ඇ. This position was admitted by the defendants under cross-examination. The Galewela-Pallepola road is not the northern boundary of defendants' Land Lot 3. The Galewela-Pallepola road has been in existence for more than 50 years. This was supported by the surveyor and the defendants in their evidence, but suddenly the road is shown as the northern boundary of the defendants' land in plan Y.

The plaintiff further says that, after being encroached by the defendants, the plan Y is included in the second part of the schedule in deeds marked as පැ 12 & 1 වි 3.

The defendant's vendor, Marianne de Soysa is a cousin of the plaintiff. Both lands were owned and occupied by the relations and hence there were no disputes in regard to the common boundaries. She lived and ran a sub post office in the building shown in plan X. It is evident that the people who came to the post office entered through a wooden gate at the point of entrance to Lot 2 along the Galewela-Pallepola road and came over Lot 2 to the post office. The road from the main road to the post office and the gate was on plaintiff's land. According to the evidence of Magie Wijeratne this witness had a boutique on the south of this land. This road was also used by people to come to the boutique.

The defendants called two witnesses. The gist of their evidence was the existence of a gate, a road through which people came along the road to the post office and a fence between the two lands. About the fence, they were unable to say with certainty whether it was permanent. They were

unable to say on whose land the gate, the road and the fence was situated. Their evidence was that a new gate was fixed on the land.

The plaintiff says that the defendants' evidence has no value and cannot be taken into consideration. The witnesses of the defense appeared in court without summons. They had met the defendants before giving evidence. It is quite possible that the defendant informed them the nature of the evidence to be given.

With regard to the western boundary of the defendants' land, the defendants' witnesses have stated that this boundary had a well. This, is in accordance with the deeds 1 වි 1, 1 වි 2 and 1 වි 3. This well was used by the adjoining land owners towards the south as a roadway to go to their lands. The defendants admitted the existence of a well during examination-in-chief, but, denied the existence of a roadway and that there is access to their land along the well. If the other land owners had used this as their access to their lands, there is no reason why they could not use it.

The surveyor states, plan Y was made at the instance of the defendant's father M.G.T. Wijeratne, the Headman. The boundaries were pointed out by him according to his wishes and not by the plaintiff.

The plaintiff and others residing on the land were not present to object. The plaintiff and the other co-owners were not informed. This survey was done encroaching on plaintiff's land along with the southern boundary up to the Galewela-Pallepola road in order to get access to the road.

The plaintiff and others had gone to Kurunegala to attend a funeral of a relation named Thomas. The death of this person at Kurunegala was supported by the defendant in his evidence. However, during the cross-examination he had denied that one Thomas had died. The Plaintiff's evidence as to his absence at this survey has to be accepted, in page 9, the defendant has stated that he, his wife, plaintiff and Magie Wijeratne were present at the survey. The surveyor's evidence is contrary to this as stated above and is to be accepted.

The evidence of the plaintiff is to the effect that the predecessor in title of the defendants was at one time the sub post mistress of the sub post office in Wahakotte, who conducted the said post office on the defendants' land.

They further stated that, at that point of time, since there was no proper access to the defendants' land, the sister of the plaintiff had permitted the predecessor in title of the defendants to gain access to the post office through their land. This is permissive user of the land which will not create a prescriptive title unless the defendants could establish the change of character of their possession. The plaintiff further explained the reason for the erecting of a fence, which was, that since there was the post office, there had to be free access to the same and they had to protect the balance part of their land from stray cattle and other intruders hence the fence.

Furthermore, the plaintiffs submitted that the best evidence to establish the true identity of the defendants' land was to call their predecessor in title as a witness and they had failed to do so, which is, a fact that has to be considered as operating adversely to their case.

The defendants' reason for the survey as depicted in plan Y is to find out the extent of their land as there was no plan. The extent of the land according to their deeds is six seers Kurakkan.

which is, 192 Perches; that is, 1 Acre 0 Roods 32 Perches. The extent in plan Y inclusive of the encroached portion (lot 2 in plan X) is only 0A-2R-P35 far less than 1A-OR-32P. Long years ago there

were no plans for village lands. The extent given is one that is probable according to the owner's thinking. If one takes the extent 192 perches as correct then the northern boundary should go further into the plaintiff's land. The disputed boundary is the northern boundary.

Plan Y was made in 1987 with the intention of obtaining a loan in 1988. In order to obtain a loan, road access is necessary. The surveyor had agreed with this in his evidence. The defendants too under cross-examination admitted that. Their evidence is that the bank informed them that an access is necessary; then, this plan was made and submitted to the bank. Plan Y is mentioned in, the second part of the schedule in පැ 12 and 1 වි 3 and altering the northern boundary by adding the words "Main Road". The defendants, taking advantage of the vendor's ignorance in not knowing the consequences, got the deeds පැ 12 and 1 වි 3 signed by her. This lady who was the plaintiff's cousin was addicted to liquor. This fact is not denied by the defendant. The plaintiff's version on this has to be accepted.

The defendants' issue 10 is whether the 1st and 2nd defendants have acquired a prescriptive title to the land. The defendants had acquired title only in 1988 according to the deed marked 1 වි 3.

The plaintiff's southern fence was broken and a gate was installed in 1990; this, conforms with the complaint marked as පැ8. This was followed by a case in the Primary Court and thereafter by the present case. Therefore, the defendants have not established prescriptive title.

One of the defendants was a person who had committed contempt of this Court, by obstructing surveyor Samarasinghe in this case and was fined after pleading guilty, a fact which he denied under cross-examination by stating that he was not present at the survey. It is with this type of behaviour that he had, broken the plaintiff's fence, encroached his land and put up a gate.

When considering the evidence of the defendants' in its entirety and points raised in these submissions, the evidence, is clearly contradictory, false and cannot be relied upon and is of no value and should be rejected.

The important point is that, this is a rei vindicatio action and the burden is clearly on the plaintiff to establish the title pleaded and relied on by him.

As per Macdonald C.J., in De Silva v. Goonetilake 32 N.L.R. 217, it was held that "The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie".

The same principle was lucidly stated by Herat J., in Wanigaratne v. Juwanis Appuhamy 65 N.L.R. 167 in the following terms;

> "The defendant in a rei vindicatio action need not prove anything, still less his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."

In this case the plaintiff has failed to do so, and his action must therefore fail.

Article 138 of the Constitution reads as follows;

(1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction

or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance :

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

In lieu of the aforesaid provisions of law, I firmly believe that it is the duty of the appellant to place before the Court of Appeal, evidence to satisfy the Court to consider whether the appeal should be allowed.

It is my view that the appellant has failed to satisfy the Court of the same.

It was decided in Fernando Vs Wijesooriya 48 NLR 320. "there must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent specifically is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse – if it be clear that there is no such intention, there can be no pretense of adverse possession."

In Abeydheera Jayasooriya Sena patabendige Kusumawathi Vs. Jayasooriya Arachchige Batabendige Wijayaratne ; SC Appeal 213/2012 dated 05.10.2018 The Supreme Court held that, adverse possession must be against the true owner who has to be specified, the defendant should demonstrate that he has never been interrupted by the owner who has title to the land, the defendant has to establish the starting point of his acquisition of prescriptive title, the number of years of adverse possession must be calculated from the date of the starting point of his acquisition of prescriptive title

In the present case the defendants have adduced evidence pertaining to title adverse to the plaintiff's title for the portion of the land that they are claiming prescriptive title. Their evidence was not contradictory and the learned District Judge has correctly observed the true nature of the defendants' evidence.

The learned district judge correctly observed that it is for the plaintiff to prove his case, that he has Title to Lot 2 as he observes, according to the evidence. After analyzing the same, the court finds that the fence has been in existence for over 25 years. Which is a question of facts, where the learned trial judge, is in a better Position to opine and he has given cogent reasons and the Court also observes that the Plaintiff did say at one point of time, the fence was there for over 15-20 years. The defendant has proved that he had undisputed uninterrupted possession of Lot 2 without any payment of any Rent or any performance of duty for over 10 years. In my view, it has fulfilled the requirements of section 3 of the Prescription Ordinance.

What is uninterrupted possession is described in Fernando vs wijesooriya 4 N.L.R 320. It was held that an essential requisite to constitute adverse possession, and will be of efficacy under the statute is continuity. Very importantly continuity is essential. Continuity should not be broken before the

10-year period. If continuity is broken possession is broken. If the defendant is put out of possession and keeping him out of possession will interrupt his prescriptive possession.

This principle was adverted in the following leading judgements;

Simon Appu vs. Christian Appu 1 N.L.R 288,
Jane Nona vs Gunawardane 49 N.L.R 522,
Perera vs Fernando 21 N.L.R 466
Samara vs Elves 25 N.L.R 427,
Saddhananda Terunnanse vs Sumanatissa 32 N.L.R 422

In the instant case, possession of Lot 2 was not interrupted by the plaintiff-appellant. The defendant is in continuous possession of the disputed land.

The 02nd limb is regarding undisturbed possession. In Simon Appu vs Christian Appu 1 N.L.R 288, it was held that possession is disturbed either by action to remove the possessor from the land which prevents the possessor from enjoying the land. Here too there was undisturbed possession. The primary court action in respect of the land where the plaintiff and the 1st and 2nd Defendants where parties were instituted on 14.11.1990 which was dismissed subsequently. As the action was dismissed, *status quo ante- stood.*

Where action is instituted and action is dismissed nothing flows from it in any event, by that time the defendants have already prescribed to the said Lot 2, for the court holds that defendants have prescribed for over 10 years. Thus, there is no disturbance as contemplated under Section 3 of the Prescription Ordinance.

The 3rd limb is the parenthetical clause. Here too there is no proof that the defendant acknowledged the title of the Plaintiff or paid him rent or acted as his agent. Thus, this ingredient does not stand in the way of the defendant.

In these circumstances, the Defendant has proved the essential ingredients of section 3 of the Prescription Ordinance. Defendant's possession was *ut dominus*. Their possession was adverse. There was no acknowledgement by the defendant on the Plaintiffs title. In these circumstances, the learned district judge was right in finding that the Defendant is entitled to Lot 2 on prescription

Your Lordships also referred to Mahawithana vs Commissioner of Inland Revenue 64 N.L.R 217- where his Lordship H.N.G Fernando, said that. It was open to the appeal Court to reconsider such findings of fact only.

The plaintiff did not lead evidence, to show and prove that, they possessed Lot 2 for over 10 years, where the evidence showed contrary. There was no evidence forthcoming to show that Lot 2 is a portion of the Plaintiffs land Lot 1. The extents in the Plan and Deed shows the correct portion. That is what the learned district judge affirmed, and in this question of fact, the Learned District Judge basing his judgement on the credibility of the witnesses believed the defendants witnesses and the surveyor. The defendant's evidence and the evidence of his witnesses were considered well. In the case of Mahawithana vs Commissioner of Inland Revenue 64 N.L.R 217 where his Lordship H.N.G Fernando, said that. It was open to the appeal court to reconsider such findings of fact.

If that inference has been drawn on a consideration of inadmissible evidence or after excluding admissible or relevant evidence. There were no such matters in the judgment. If the inference was a conclusion of facts drawn but unsupported by legal evidence the learned district judge had not

erred on this ground. If the conclusion drawn from relevant facts is not rationally possible and is perverse it should therefore be set aside. The judgment is not perverse or unreasonable and the learned district judge has considered all relevant material and had not erred.

In the following cases more or less Laydown the observations in the Mahawithana's case (*supra)* referred to earlier and the underlying fact is that a decision of the judge so express so explicit upon a question of fact is overruled by an appellate court.

Fradd vs Brown & Co.Ltd 20 N.L.R page 282,
Munasinghe vs Vidanage 69 N.L.R page 97,
Watt vs Thomas (1947) 1 ALL E.R. 582,
Wickramasuriya vs satnarasinghe 68 N.L.R page 39,
Alwis vs Piyaseeli 93 1 SLR 121,
Jlnendardasa Thero vs Piyarathne Thero 1982-1-273,
Falalhoon vs Cassim 20 N.L.R page 332, S.S.
Hontestroom vs Sagaporack 1297-AC 37, Pius vs Centel Ltd 2012-2-172.

The issue at large is whether the learned district judge erred in these facts was the judgment perverse. The judgment is not perverse and Court has not erred and had followed the strict guidelines set down in the Mahawithana's case.

The learned trial Judge has not committed any errors in arriving at his decision. The finding of facts by the learned Judge are not perverse and he has not demonstrably misjudged the position of the defendant and therefore the judgment of the learned District Judge dated 23.04.1999 is a well-considered judgment.

The defendants have adduced evidence pertaining to title adverse to the plaintiff's title for the portion of the land that they are claiming prescriptive title. Not only that, the plaintiff's evidence was contradictory.

The learned District Judge has not committed any errors in arriving at his conclusion. The finding of facts by the learned trial Judge are based on evidence adduced and he has correctly analyzed the evidence adduced by both parties and has finally concluded that the defendants are the lawful owner of the disputed block of land.

The learned trial Judge's findings are in accordance with sound legal principles. Hence, we conclude that there is no merit in this appeal and deserves to be dismissed with costs.
Thus, we affirm the impugned judgment dated 23.04.1999 made by the learned District Judge of Matale.

Appeal dismissed with costs.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal